IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: O R D E R :

Shree Rajasthan Syntex Ltd.
Vs.
Employees State Insurance Corporation & Others

(S.B. Civil Writ Petition No.5664/1993)

DATE OF ORDER : October 25, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. N.S. Acharya/Mr. J.L. Purohit for petitioner.
Mr. Sanjay Mathur/Mr. Harish Purohit for respondents.

Reportable BY THE COURT :

By way of filing this writ petition, the petitioner has prayed for quashing order dated 19.10.1993 passed under Section 45A of the Employees' State Insurance Act, 1948 and, that, the respondents may be restrained from recovering the amount mentioned in order dated 19.10.1993. It is also prayed that the respondents may be restrained from proceeding against the petitioner in relation to its employees at its registered office at

Udaipur in pursuance of the provisions of the Act of 1948 because the petitioner's establishment at 4-D, New Fatehpura, Udaipur is not a shop.

During the course of arguments, learned counsel for the petitioner apprised this Court that as per the decision of the Division Bench of this Court in D.B. Civil Special Appeal No.6/2005, arising out of the judgment dated 25.03.2004 passed by the learned Single Judge in S.B. Civil Misc. appeal No.671/1996, the controversy with regard to liability under the Act of 1948 is finally decided and the petitioner firm is not disputing the liability after final adjudication of the matter by the Division Bench. It is, however, vehemently argued by learned counsel for the petitioner that the petitioner company is a company registered under the Indian Companies Act, 1956 and the respondent Regional Director, ESI Department, Jaipur issued notices on 21.02.1986 and 28.08.1986 under Section 44 of the Act of 1948 calling upon the petitioner company to deposit the contribution. It is submitted that reply was filed to the noticed issued by the Regional Director in which it was prayed that the petitioner company was not liable to deposit any contribution as demanded by the Department under the notices Annex.-2 and 3. The said action of the Regional Director was challenged by way

of filing suit by one Rakesh Yadav and the said suit was contested by the Regional Director on the grounds inter alia that Shri Rakesh Yadav had no authority to file the suit on behalf of the petitioner's company. The Court ultimately held that Rakesh Yadav had no authority to file the suit on behalf of the petitioner company and the judgment was given by the Court on other two issues relating to the merit of the claim. The said judgment dated 15.11.1992 was challenged by the petitioner company by way of filing appeal before this Court and the learned Single Judge of this Court finally decided the appeal vide judgment dated 25.03.2004 and upheld the order passed by the learned Civil Judge in ESI Case No.2/1986 dated 15.11.1992 by which the liability of the petitioner company for contribution was upheld. The judgment passed by the learned Single Judge dated 25.03.2004 was further upheld by the Division Bench of this Court vide judgment dated 13.07.2005.

In these circumstances, there is no dispute with regard to liability to pay the contribution by the petitioner company but the petitioner company is now challenging the notice which is issued under Section 45A by the Deputy Regional Director, ESI Corporation, Jaipur on the ground that under the provisions of the Act, the Deputy Regional Director is not competent to

determine the contribution. The power to determine the amount of contribution payable in respect of the employees of the factory or establishment is left with the Corporation. Learned counsel for the petitioner has invited my attention towards Section 45A of the Act of 1948 which reads as under :

> "**45A. Determination of contributions in certain cases.**- (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:
>
> Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.
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> (2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B or the recovery under sections 45C to 45-I."

It is further contended by learned counsel for the petitioner that the controversy with regard to determination of the amount of contribution has been decided by this Court in Employees' State Insurance Corporation, Jaipur Vs. Bharat Motors,

Sriganganagar, reported in 2001 LLR (Raj.) 49 and the Division Bench of this Court has held as under :

> "We are unable to countenance the submission made by Mr. Mathur that the opportunity of hearing is to be given only in those cases where no returns, particulars, registers or records are submitted in accordance with the provisions of Sec.44 of the Act. A reading of sec.44 clearly show that an opportunity shall be afforded to the employer before determining the contribution payable by the employer. No other provision is available except the provisions of Sec.45A for determination of the contribution payable by the employer. In our opinion, the Inspector has no authority to determine the quantum of contribution payable by the employer and it is only the Regional Director of the Employees' State Insurance Corporation who has jurisdiction to decide the contribution payable. At best, the inspection report submitted by the Inspector can be taken into consideration while determining the contribution. Under such circumstances, the order passed by the Corporation without affording opportunity to the employee under section 45 is bad in law and therefore, the said order is liable to be set aside. The learned Single Judge has rightly rejected the contention made by the Corporation. No interference is called for. Accordingly, this appeal is rejected. The order of the learned Single Judge is confirmed." (Emphasis supplied)

Thus, according to learned counsel for the petitioner, the Regional Director of the Corporation alone has jurisdiction to determine the contribution which is payable in accordance with Section 45A of the Act of 1948. Therefore, learned counsel for the petitioner argued that the impugned notices have been issued by incompetent authority having no

jurisdiction to issue the same or to determine the contribution and, accordingly, it is prayed that the same may be quashed.

Learned counsel for the respondents vehemently argued that this petition is not mnaintainable in view of the fact that according to Section 75 of the Act of 1948 the matter is required to be decided by the ESI Court. It is contended that statutory remedy is provided under the Act and, therefore, the present petition is not maintainable.

I have heard learned counsel for the parties and carefully perused the record.

In this writ petition, though notices have been issued to the respondents but no reply on merit has been filed by the respondents and only preliminary objection is raised that there is remedy available under Section 75 of the Act of 1948 before the ESI Court and, therefore, the writ petition deserves to be dismissed only on the ground of statutory remedy because the petitioner has not availed the statutory remedy.

This writ petition is pending since the year 1993. Apart from that, availability of statutory remedy by itself does not constrict the jurisdiction of this Court. In this regard, reference may be made of the judgment of the Hon'ble Supreme Court in the case of A.V. Venkateswaran Vs. Ramchand Sobhraj Wadhwani & Another, reported in AIR 1961 S.C. 1506, as well as judgment reported in (1999) 4 SCC 396. If the order is without

jurisdiction the writ petition cannot be thrown aside merely on the ground of not resorting to adequate alternative or statutory remedy. In exercise of jurisdiction under Article 226 of the Constitution of India, the order passed by the incompetent authority can be quashed and it is not imperatively necessary to dismiss the writ petition on the ground of availability of the adequate alternative or statutory remedy.

Reference may also be made of the observations of their Lordships of the Supreme Court, in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Others, (1998) 8 CC 1, wherein vide para 14 and 15, it is held as under :

> "14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".
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> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there

> has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

In this case, the liability of the amount of contribution has been finally adjudicated upon by the Division Bench of this Court while upholding the judgment of the learned Single Bench. Save for choosing to raise the preliminary objection as to the maintainability of the writ petition on the ground of alternative statutory remedy, the respondents have not come forward with any detailed reply to the averments of the petitioner in the writ petition. Before this Court, the thrust of the petitioner's argument is that the impugned notices have been issued by the authority not empowered to exercise the jurisdiction vested in the Corporation and, therefore, only the Regional Director of the Corporation is the competent authority to raise the demand towards liability of the petitioner to pay contribution. There is force in the petitioner's submission that the Regional Director of the Corporation is required under the jurisdiction vested in it to determine the quantum of contribution and, therefore, opportunity of hearing the petitioner must also be afforded before the quantum of contribution is determined. The crux of

the matter is that only the Regional Director of the ESI Corporation has jurisdiction to decide the contribution payable and an order passed by the Corporation without affording opportunity to the employer petitioner under Section 45A of the Act of 1948 is bad in law. Accordingly, the impugned notices having been issued by incompetent authority without jurisdiction deserve to be quashed and set aside.

As a result, this writ petition is allowed. The impugned notices Annex.-2 and 3 as well as orders dated 19.10.1993 passed by respondent No.2 are quashed and set aside. The Regional Director, ESI Corporation, Rajasthan, Jaipur is directed to determine the contribution which is payable by the petitioner company and pass orders in accordance with Section 45A of the Act of 1948.

No order as to costs.

(Gopal Krishan Vyas) J.